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In the Supreme Court of the United States

OCTOBER TERM, 1991

PHILLIPS PETROLEUM CO., CHEVRON U.S.A. INC., and CONOCO INC., PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

In our petition for certiorari, we demonstrated that the interpretation of Section 10(a) of the Outer Continental Shelf Lands Act adopted by the Federal Circuit deviates dramatically from the heretofore uniform body of law construing statutes of limitations. We also explained that that interpretation will have absurd and unfair results: whenever gas ceiling prices are retroactively reduced more than two years after the making of a royalty payment based on such prices, the payor's claim for a refund will be time barred before the claim even accrues.

The government does not deny that its interpretation of Section 10(a) will bar the refund claims of payors before they have any right to a refund. Nor does it contest the general rule that statutes of limitations do not begin to run until the underlying claim accrues. Instead, it relies largely on boilerplate statements about plain meaning and waivers of sovereign immunity to bolster its implicit contentions that Section 10(a) is different from all other statutes of limitations and that Congress really did intend to provide the MMS with a windfall whenever

gas prices are retroactively reduced more than two years after the royalty payments based upon them have been made.[1] Its express arguments are as misguided as its implicit ones.

1. The government begins by asserting (Br. in Opp. 7) that the phrase "two years after the making of the payment" is susceptible to only one interpretation: the two-year period runs from the time of the royalty payment, regardless of whether that payment is in the amount required by law at the time it is made. This reading is far from plain; indeed, *both* courts below rejected it. Applying the well-established principle that words in a statute cannot be parsed in isolation, but instead must be read in context, both the Claims Court and the Federal Circuit concluded that the term "payment" means "excess payment." Pet. App. 5a, 17a.[2] The lower courts simply disagreed on when an "excess payment" occurs. Thus, Section 10(a) hardly can be read as unambiguously dictating that an excess payment occurs at the time of the royalty payment even if the payment is *not* then excessive.

Of course, even if the meaning of Section 10(a) were as "plain" as the government contends, that would not end the inquiry. This Court has made clear on countless occasions that when the literal interpretation of a statute will yield absurd results, that interpretation must give way to a more sensible reading. See, *e.g.*, *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 454-455 (1989); *United States* v. *American Trucking Ass'ns, Inc.*,

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[1] There can be little doubt that when gas ceiling prices are retroactively *increased*—as they were when FERC adopted the dry rule—MMS would insist that it has a right to 12½% of the retroactive payments no matter how many years had elapsed.

[2] See, *e.g.*, *International Primate Protection League* v. *Administrators of Tulane Educ. Fund*, 111 S. Ct. 1700, 1705 (1991) ("We continue to recognize that context is important in the quest for a word's meaning and that statutory construction is a holistic endeavor.") (brackets, ellipses, internal quotation marks, and citations omitted).

310 U.S. 534, 543 (1940); *United States* v. *Ryan*, 284 U.S. 167, 175 (1931). As we explained in our petition for certiorari (at 25-28), that manifestly is the case here.

2. The government next contends (Br. in Opp. 8, 10) that Section 10(a) should be construed narrowly because that provision is a waiver of sovereign immunity. It neglects the admonition contained in the very case upon which it relies, however, that while courts should not interpret statutes of limitations in a manner that would "extend the waiver beyond that which Congress intended," they "should not construe such a time-bar provision unduly restrictively" either. *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983) (internal quotation marks omitted). See also *United States* v. *Kubrick*, 444 U.S. 111, 118 (1979) (in construing statutes of limitations for claims against the United States, courts should not "assume the authority to narrow the waiver [of sovereign immunity] that Congress intended").

The interpretation of Section 10(a) espoused by the government and adopted by the Federal Circuit is just the kind of unduly restrictive interpretation the Court warned about in *Block*, particularly in view of the fact that Congress gave *no* indication that it intended to bar claims before they accrued. See *United States* v. *Wurts*, 303 U.S. 414, 418 (1938).[3] Indeed, as we explained in the petition (at 22), the legislative history of Section 10(a) indicates that Congress merely intended to tailor an earlier statute—which had been authoritatively interpreted to permit refund claims within two years of the

[3] The government contends (Br. in Opp. 9) that its narrow reading of Section 10(a) is compelled by the "very purpose" of that provision—"to establish repose and protect the fisc." But here, and in every other case in which a judicial decision, FERC order, or congressional enactment retroactively reduces gas ceiling prices, the government will have had actual notice that that contingency might occur. Accordingly, the kinds of concerns that come into play with long-overlooked accounting errors are entirely absent when, as here, the royalty payments at issue were in the amount required by law at the time they were made.

time a royalty payment becomes excessive—to the context of outer continental shelf royalty payments.

The government also is wrong in asserting (Br. in Opp. 10) that because this case is against the federal government "none" of the many cases we cited in support of the basic proposition that statutes of limitations do not begin to run until the underlying claim has accrued "has any relevance."[4] As early as a century ago, this Court applied that rule in a case against the United States. See *United States* v. *Louisiana*, 123 U.S. 32, 37 (1887) (time for bringing action for payment of moneys received by United States from sale of swamp land within a state runs from time that swampy character of lands is determined administratively, not from the date of the sale). More recently, this Court held that the same equitable tolling principles that apply in private litigation apply in litigation against the government. *Irwin* v. *Veterans Admin.*, 111 S. Ct. 453, 457 (1990). As the Court explained, "[s]uch a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation." *Ibid.* Plainly, *Irwin* indicates that general principles for construing statutes of limitations apply regardless of whether the defendant is a private party or the United States.[5]

Notwithstanding the government's contention (Br. in Opp. 10), *United States* v. *Dalm*, 110 S. Ct. 1361 (1990), does not suggest otherwise. In *Dalm*, a taxpayer sought to treat a payment to her as a gift rather than as income

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[4] The government does not—and cannot—attempt to excuse the Federal Circuit's erroneous gloss on the discovery rule on this ground. See Pet. 17-19. That rule plainly applies with full force to claims against the government. See *Kubrick*, 444 U.S. at 120-123 & n.7.

[5] Indeed, the Ninth Circuit recently applied *Irwin* to hold that the 15-day period for challenging federal timber sales was equitably tolled by enactment of a federal statute that purported to eliminate the basis for such challenges. See *Seattle Audubon Soc'y* v. *Robertson*, 931 F.2d 590 (9th Cir. 1991).

for tax purposes. The IRS reached a contrary conclusion and assessed an income tax deficiency. After settling the deficiency, she sought return of the gift tax she had paid. This Court held that the Tax Court lacked jurisdiction to adjudicate her claim because the statute of limitations, which required claims to be filed within two years of the time the tax at issue was paid, had expired. In so holding, the Court concluded that the statute of limitations ran from the date the taxpayer paid her gift tax, not from the date that the gift tax payment was determined to be in error. *Id.* at 1369 n.7.

Dalm is perfectly consistent with the rule that statutes of limitations do not begin to run until the plaintiff can pursue a claim. In *Dalm*, the taxpayer's *voluntary* decision to treat the payment as a gift was erroneous *ab initio*. *Dalm* had a right to a refund from the moment she paid the gift tax. Consequently, her claim was not barred before it accrued. Here, by contrast, petitioners had *no* right to a refund at the time they made their royalty payments. Those payments were correct—and required by law—at the time they were made. Petitioners did not have any right to a refund until after the ceiling price of gas was retroactively reduced and they were ordered to make refunds to their customers.[6] Accordingly, the Court's conclusion that the statute of limitations began to run at the time Dalm paid her gift tax is inapposite here.[7]

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[6] *Dalm* would be like this case if the taxpayer had been *required* to treat the payment as a gift under IRS regulations, but then was required to pay income tax on it as a result of legislation retroactively overturning the IRS regulations.

[7] The government has improperly recast the question presented to make this case seem like *Dalm* (Br. in Opp. I), when in fact it is quite different. The Claims Court did not hold—and we have never asserted—that the two-year period runs from the date a royalty payor realizes (whether after a judicial decision or otherwise) that a payment was "incorrect." (Indeed, we expressly disclaimed that position in our petition for certiorari (at 4 n.1).) Rather, the question here is whether the two-year period runs from the date a judi-

3. The government argues in the alternative (Br. in Opp. 10-11) that petitioners' "right to seek a refund" accrued at the time they made their royalty payments. This contention is doubly flawed.

To begin with, the government's implicit assumption—that it is the right to file a protective notice rather than the actual right to obtain a refund that matters for accrual purposes—is absurd. As the numerous cases cited in the petition (at 14-16, 27-28) make absolutely clear, the rule is that statutes of limitations do not begin to run until *all* events necessary to state a claim have occurred: the availability of a notice procedure is irrelevant. Remarkably, the government does not even attempt to reconcile its position with *Wurts*, *Woods*, *Crown Coat*, and the other decisions discussed in the petition.

In any event, the government exaggerates greatly in asserting (Br. in Opp. 11) that "petitioners had a fully adequate opportunity to file their claims in a timely manner"—*i.e.*, the protective filing mechanism established in the December 1981 opinion of the Solicitor of the Interior. The very fact that the government can point to only one major producer (Texaco) that complied with its assertedly adequate procedures—as opposed to the numerous others that did not—is compelling circumstantial evidence that those procedures were not adequate.[8]

The reason the procedures were inadequate is the inherent Catch-22 that the Solicitor of Interior's opinion created. On the one hand, the opinion indicated that producers who believed that a legal challenge to gas prices

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cial decision, regulatory action, or legislative enactment renders a formerly *correct* payment excessive.

[8] For similar reasons, the government is wrong in concluding (Br. in Opp. 7) that because producers did not make very many protective filings in the decade following publication of the Solicitor of Interior's opinion, our prediction that the Federal Circuit's opinion will result in a flood of protective filings is unlikely to come true.

might give them a right to a refund of royalty payments "can interrupt the [two-year limitations] period by notifying the Department in writing of the challenge and of the approximate difference in the price should the challenge succeed." *Refunds and Credits Under the Outer Continental Shelf Lands Act*, 88 I.D. 1090, 1102 (1981).[9] On the other hand, the opinion stated that every refund request "must give the Department enough information to rule on it," including "the amount requested and the basis for the request." *Id.* at 1099 & n.10 (internal quotation marks omitted). According to the opinion, requests that "do not ask for specific amounts or give reasons why the payments are excessive" do not constitute "requests" and therefore do not operate to stop the running of the statute of limitations. *Id.* at 1100.

Any producer that filed a claim as suggested by the Solicitor of Interior thus risked having it rejected as inadequately specific. This is not mere conjecture. MMS rejected a notice filed by Union Oil Company—which referred to the *INGAA* challenge and indicated that the case could reduce gas prices by approximately 2%—as failing to meet the specificity requirement contained in the Solicitor of Interior's opinion. See *Shell Offshore, Inc.*, 96 I.B.L.A. 149, 168-169 & n.9 (1987) (reversing MMS' rejection of Union Oil's claim). Accordingly, it is no wonder that so few legally sophisticated producers filed protective notices during the *INGAA* litigation.

4. The government's attempt to downplay the relevance of the 1941 opinion of the Comptroller General is similarly deceptive. The government first asserts (Br. in Opp. 12) that the opinion is irrelevant because it involved a different statute. As we explained in the petition (at 22),

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[9] The opinion does not say how the two-year period can be "interrupt[ed]" if it already has expired before the royalty payor learns of a contingency that might result in a retroactive change in gas prices. This was the case with the 1971 FPC order retroactively changing the price of gas for the years 1962 through 1970. See Pet. 25-26.

however, that statute was the direct predecessor of Section 10(a), and the legislative history unambiguously reveals that in enacting Section 10(a) Congress had no intention to effect a substantive change. Thus, the Comptroller General's authoritative interpretation of the predecessor provision—which was fully consistent with well-established principles governing the interpretation of statutes of limitations—is more than just relevant; it is deemed incorporated within Section 10(a). See Pet. 22-23 & n.10.

Next, the government quotes extensively from the Comptroller General's opinion in an effort to show that the reason the Comptroller General did not hold that the two-year limitations period ran from the date of payment was that "a ruling of this type would be more in the nature of legislation than interpretation." Br. in Opp. 12-13. The government suggests that in enacting Section 10(a), Congress did what the Comptroller General thought he was precluded from doing under separation of powers principles. The government badly misreads the Comptroller General's opinion.[10]

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[10] The government also misreads the Comptroller General's 1974 letter applying the principles set forth in the 1941 opinion to Section 10(a). See Br. in Opp. 13-14 n.8. In particular, it asserts that the basis for the Comptroller General's conclusion that the two-year limitations period ran from the time the unitization agreement was approved was the fact that the royalty payments were made under protest. However, nothing in the Comptroller General's letter indicates that the payments in fact were made under protest or that that was the basis for the Comptroller General's conclusion. (Perhaps the government was confused by the opinion's reference to a 1965 case in which the payments *were* made under protest.) Rather, his reason can be found in the very fairness concerns that motivated the 1941 opinion as well as the interpretation of Section 10(a) adopted by the Claims Court here:

> The primary basis for the conclusion reached in our decision of November 5, 1965 * * * was the fact that the claim was filed within two years of the date upon which it could first be determined that excess royalty payments had, in fact, been made. Similarly, in the instant case Union's application was filed

To begin with, *every* passage quoted by the government is from the Secretary of Interior's letter requesting the Comptroller General's opinion, which was quoted at length at the beginning of the opinion, and not from the opinion itself. The Comptroller General's opinion in fact neither agreed nor disagreed with the Secretary's assumption that holding that the two-year period should run from the date of payment was legislative action outside of the Comptroller General's authority.

Of equal importance, in selectively quoting the Secretary's letter, the government ignores the Secretary's principal reason for opposing the use of the date of payment as a triggering date: such an interpretation "would work an injustice in cases wherein the occurrence of the excess payments could not have been determined by the payor, even with due diligence on his part, until more than two years had elapsed." 20 Comp. Gen. 734, 736 (1941) (91-34 Pet. App. 85a). Indeed, it is for that very reason that the Secretary proposed that, in cases not involving land patents, the predecessor to Section 10(a) should be construed to impose *no* statute of limitations for requesting a refund of excess payments. 20 Comp. Gen. at 737. The Comptroller General rejected this open-ended approach in favor of one that better accommodated the various competing interests: the two-year period begins to run from the date a subsequent event renders a previously accurate payment excessive. *Id.* at 739. That was the authoritative interpretation in force at the time that Congress enacted Section 10(a) without any intention to effect a substantive change from existing law.

In sum, none of the government's arguments justify the counterintuitive, unfair interpretation of Section

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within two years of the date the Unit Agreement was approved, and it was only at this time that the amount or, for that matter, even the existence of an overpayment became known.

Letter from Comptroller General Elmer B. Staats to Senator Henry M. Jackson (July 8, 1974) (91-34 Pet. App. 74a).

10(a) adopted by the court of appeals. Because that interpretation conflicts with numerous decisions of this Court construing statutes of limitations, the petition for certiorari should be granted.

Respectfully submitted.

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